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ABSTRACT

The government of Ontario announced in 1984 that it would begin to fund Catholic high schools in 1985. Prior to this announcement, Ontario had operated since the 1800s under a system that provided for the public funding of a dual system of Protestant and Catholic public elementary schools and a single system of nondenominational secondary schools. Since the majority of Ontario's residents were non-Catholic, this arrangement developed into a system of essentially nondenominational public elementary and secondary schools supplemented by alternative public, Catholic elementary schools and a scattering of private schools of various types. This system of alternatives is now being extended into secondary education. The change raises a number of legal and constitutional questions, however. This paper reviews the historical factors behind the creation and development of Ontario's public school system, examines the constitutional issues raised in relation to Canada's Constitution Act of 1867 and the recently adopted Canadian Charter of Rights and Freedoms, presents the findings of the Commission on Private Schools in Ontario (created when the decision to fund Catholic high schools was announced), discusses recent court decisions relevant to the issues, and suggests possible ways in which the debate may be resolved. Twenty-six footnotes are appended. (PGD)

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PUBLIC, PRIVATE AND SEPARATE SCHOOLS IN ONTARIO: DEVELOPING A NEW SOCIAL CONTRACT FOR EDUCATION?*

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Abstract

When Premier William Davis announced, on June 12, 1984, that government funding of Roman Catholic separate schools in Ontario would be extended from grade 10 to grades 11 through 13, many questions that seemed resolved when Ontario entered Confederation in 1867 were reopened. What, for example, is the role of the public school in society? Why should the state fund the schools of one religion (Roman Catholic) and not others? Perhaps recognizing the inevitability of these questions, the Premier also announced at a Commission would be set up to look at the funding and governance of private schools in the province.

To understand how it is that Ontario, as well as four other Canadian provinces that are home to almost eighty percent of the country's population, have more than one government funded and operated system of education, one must recapture the religious fervour and divisions of the mid-nineteenth century. At that time, the Protestant religious revival and economic dominance, which led to a single system of schools in countries such as the United States, New Zealand, and Australia, failed to achieve this goal in Canada due to the preponderance of Roman Catholics in Quebec. Instead, both Catholics and Protestants sought protection in their own "separate" schools, whenever either was in a minority. This legacy, protected in the Canadian Constitution, has imposed a structure on education that has sometimes thwarted reformers, but has resulted in strong public support for education. Yet in Ontario today, given the steady transition of the majority education sector into a secular system of schooling, extension of the Roman Catholic school system is seen as an opportunity for other religious groups to demand public funds for their schools. The tenor of recent court decisions and the general disregard of the report of the Commission on private schools, however, suggest that this opportunity may be lost.

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On June 12, 1984, Ontario Premier William Davis announced in the legislature that the government of Ontario would begin to fund Catholic high schools starting in September 1985. This announcement was without precedent, in that it reversed a government policy that had stood since, at least, 1908 and perhaps since Confederation in 1867, a policy which had been successfully defended in the courts in the 1920s.[1]

With the new policy, the Premier announced the formation of three commissions: one to deal with the planning and implementation of the extension of funding to Roman Catholic separate schools (which were already funded at the elementary level by government); one to consider the methods by which government financed education; and one to investigate matters related to the governance and possible direct funding of private schools.[2]

Taken together, the breadth of the government initiatives suggested an opportunity was at hand to develop a new social contract for education, one which would reflect a more generous view of what types of education were in the public interest and deserving of public support, and one which would take into account the religious and ethnic pluralism of Ontario in the 1980s. Yet, even from the start, there were barriers to such a full discussion. First, the government never provided a forum for discussing whether or not it should fund Catholic high schools; the decision had been taken without public debate. Second, since public funding of these schools was the policy of both the

opposing Liberal and New Democratic Parties, there was no debate on the fundamental question in the legislature.

The purposes of this paper, then, are to describe the historical background of the question of separate school funding in Ontario; to summarize the findings of the private school commission; to note recent court decisions related to the Ontario school system; and to suggest likely outcomes of the current debate on the structure of education in Ontario.

Historical Precedents

Education in Canada is matter reserved for its ten provinces by the Constitution Act, 1867 and the Constitution Act, 1982 with two major exceptions: the federal guarantees for the preservation of denominational and dissentient schools that existed by law in the respective provinces at the time of their entering Confederation (guaranteed by both Acts), and the right of French or English minorities to be educated in their own language (guaranteed by the second Act).[3] Since the situations differ in each of the provinces, the overall situation is complex.

In the case of religious schooling, Newfoundland has four denominational systems (Integrate Protestant, Roman Catholic, Pentacostal, and Seventh-Day Adventist); Quebec has denominational systems (Roman Catholic and Protestant) in its two major centres but public and separate systems elsewhere; Ontario, Alberta and Saskatchewan have public and separate systems; and the other

provinces have but one public system, though several have made accommodations for Catholic schools within the public system, accommodations not receiving constitutional protection.

In the case of minority languages, three provinces (New Brunswick, Nova Scotia, and Prince Edward Island) have set up schools systems for francophones; in the others, schools for francophones exist within the existing public, denominational, or separate systems. Attempts to recast Quebec's school systems along language rather than religious lines have been stymied by the courts, which have found that government proposals to date violate protections for denominational and separate schools. Ontario is about to try its own foray into this field, with a proposal to set up a homogeneous French-language school system in the Ottawa area.

As well, private schools exist in all provinces, and are given public aid in five (British Columbia, Alberta, Saskatchewan, Manitoba and Quebec).

The history of schooling in Ontario, the subject of this paper, is closely tied with that of Quebec, since before the formation of the current Canadian Confederation in 1867, the two were governed by a single legislature for a period of 27 years. This legislature, though, often passed distinct laws for Upper Canada or Canada West (Ontario), with its primarily Protestant, English-speaking population, and for Lower Canada or Canada East (Quebec) with its primarily Catholic, French-speaking population.

The Ontario System to 1985

By the laws in effect in Ontario at Confederation, the residents of a given community could elect a school board of three trustees to build and operate a common school. This school board could requisition property taxes in support of the school and was eligible for provincial grants. However, if the trustees of this common school appointed a Protestant teacher, then Roman Catholic residents had the right to elect their own school board, referred to as a separate school board, and erect their own school, hire their own Catholic teacher, direct their property taxes to that school, and collect provincial grants. Conversely, if the first school board formed in a community appointed a Roman Catholic teacher, then Protestants in the area had the right to withdraw and form their own Protestant separate school board.

Politically, it is clear that provision for separate schools in Ontario, with its large Protestant majority, would not have been made but for the mutual desire of Protestants in Quebec for their own schools in that primarily Catholic society, and the willingness of Catholic legislators there to unite with Catholic legislators from Ontario to assure symmetrical rights for Catholics.

At the same time, various Protestant denominations repressed their own differences with one another and chose not to demand separate school systems for each of them. Indeed, it was a great disappointment to Protestant school leaders in Ontario that they

were not able to win over all Catholics, and especially the Catholic hierarchy, to the ideal of a "common school" for all.

Through the years, amalgamation of school boards into larger units has brought about some changes in the relationship of the two types of school boards. All but one of Ontario's Protestant separate school boards have ceased to operate schools or merged with the non-denominational boards of education. The one active Protestant separate school board enrols only about 160 elementary pupils in its one school. Catholic school boards, including both Roman Catholic separate school boards and those common school boards where Catholics were in the majority, have been merged into Roman Catholic separate school boards. The level of education these boards are allowed to offer, though, has been a matter of controversy for some time.

In 1871, the Province of Ontario moved to set up a system of secondary schools, and in doing so defined all common schools, including that special form of the common school, the separate school, as elementary schools. Secondary school boards were created to operate non-denominational secondary schools for teaching subjects in grades 9 to 13.[4] Hence, Roman Catholic separate school boards were limited to offering instruction in grades 1 through 8, though subsequent decisions allowed them to operate "continuation schools" teaching subjects in grades 9 and 10.

Since in 1871 few children were completing grade 8, let alone grade 13, the province's decision was not immediately challenged by Catholic educators, citizens, or the church hierarchy. But as secondary education became more widespread towards the turn of the century, Catholics pressed for high schools of their own, noting that, in fact, common schools had sometimes offered instruction in higher grades even before Confederation.

To resolve the question of whether the Province had acted constitutionally in providing for only non-denominational high schools, in the early 1920s the Province agreed with Catholic leaders to submit a test case to the courts. The final decision was not made until June 12, 1928, when the Privy Council in England (which under the British North America Act, 1867 served as the last court of appeal) ruled in Tiny Township vs. The King that the Province had, in fact, acted constitutionally; that is, the right to separate schools existed only at the elementary level.[5]

Between June 12, 1928 and June 12, 1984, the issue of extending the separate school system (or completing it, to use the language of Catholic advocates) was rarely raised publicly. Perhaps the most notable exception was in the 1971 election compaign when both opposition parties, the Liberals and New Democratic Party, took positions favouring such an extension. They were soundly defeated by Premier William Davis' Progressive Conservatives, who argued such a move would require unnecessary duplication of services and would be socially devisive.

Nevertheless, significant changes were taking place. Post-war immigration had led to an increase in Ontario's Catholic population; Irish and French Catholics were joined by co-religionists from countries such as Italy and Portugal.[6] As well, with the increased wealth of the post-war period, Roman Catholics had been able to expand their own private high school system to about 80 schools enrolling 30,000 students in grades 11 to 13. Usually, these private schools operated in the same buildings that housed publicly funded separate school grades 9 and 10. Thus, they were hybrid institutions, part private and part separate, with a given teacher being employed by both the private school (usually owned by a diocese or religious order) and the elected Roman Catholic separate school board.

Extension Announced

Between the 1971 election and his announcement in the legislature in 1984, Premier Davis had made no indication that the policy of no government support for Catholic high schools was being reconsidered. Though the government has since changed (no doubt in part due to the unpopularity in some quarters of this reverse in policy by the Progressive Conservatives) the party that has formed the current government, the Liberal Party, has continued with the original schedule to extend the separate school system one grade at a time, beginning with grade 11 in September 1985. As well, it introduced a bill, designated as Bill 30, An Act to amend the Education Act, which would apply retroactively to legalize the steps the government has already taken by passing

orders-in-council to extend financing to grade 11 this past September.

The entire process has not been without its critics. Yet, with all three provincial parties supporting the bill in principle, there has been no political forum in which the decision could be challenged. For that reason, a number of opponents of the extension of funding have sought to have the constitutionality of the proposed bill tested. In particular, they questioned whether the bill is constitutional under the Canadian Charter of Rights and Freedoms, which was adopted at the time the Canadian consitution was patriated in 1982 and which came into full effect in April 1985.

Constitutional Issues[7]

The constitutional issues can be separated into two groups: those concerned with the original rights and privileges under the Constition Act, 1867 and those related to the Charter of Rights and Freedoms. The first category also has two subsidiary questions, whether the Province must extend financing, or whether is may do so under the existing provisions for separate school or by enacting new provisions for Roman Catholic secondary schools.

While it appeared that the question of whether the Province was forced by the Constitution to fund secondary grades in separate schools was answered in the Tiny Township case, some argued that either that the Privy Council was in error or that new evidence is

available that requires a rehearing of the case. Regardless of the argument, if the courts did find that the Constitution required funding of high school grades in separate schools, then the same arrangements that now apply for grades 1 to 10 in Roman Catholic separate schools would apply.

On the other hand, a more conservative position is that the Province may extend financing to grades 11 to 13 in separate schools. This argument is based on the regulatory powers granted by the Education Act to the Province over both separate school boards and non-denominational boards of education. That is, just as the Province can set standards for teachers, approve textbooks and the like, so can it determine what programs are offered, as long as it does not "prejudicially" affect the rights of Roman Catholics to their own separate schools. Certainly, adding grades 11 to 13 could hardly been seen as prejudicially affecting the rights of Catholics.

An alternative to this latter position is the view that the Province is free to create, as new entities, Roman Catholic secondary school boards (even if it required existing separate school boards to administer these schools) but cannot "extend" the separate system per se since it has been legally defined as an elementary system (a factor "solved" in the regulations promulgated to fund grade 11 in September 1985 by simply defining grade 11 as an elementary grade). In this case, as distinct new creations, the schools of these new secondary boards would be free from any constitutional restrictions that might apply to separate

schools -- but might be more likely to be seen as a violation of the Charter of Rights and Freedoms.

One of the key sections, section 15(1), of the Charter states,

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[8]

Further, section 27 states,

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage if Canadians.

In view of these sections of the Charter, if the Province now grants a new right or privilege to Roman Catholics, must it not also do so to other religious and even ethnic groups? Indeed, this is the argument of those supporting greater choice and diversity in education in Ontario. They argue that if the Province is to fund high schools for Roman Catholics, they must do so for Jews, Anglicans, Hindus, Moslems, evangelical Christians, and, perhaps, Chinese, Italians, and so forth. Indeed, some argue that Roman Catholic's rights to separate schools at the elementary level ought to be extended to other groups as a result of the new Charter, even though the rights of Catholics have existed since before Confederation and have therefore been seen as special. Yet others use this same clause in the opposite way, suggesting that it forbids the extension of funding to Catholics and others. (Clause 29 of the Charter ensures existing rights to separate

schools are not infringed by the Charter.[9]) These issues, among others, were considered by the Commission on Private Schools in Ontario.

Commission on Private Schools

In his statement to the Legislature regarding the government's new policy of funding Roman Catholic high schools, the Premier acknowledged that the new policy

> legitimately raises questions about the place of independent schools in our province ... (and that) it is timely and useful to review the role of these schools in educating our children.[10]

Pursuant to this announcement, Bernard J. Shapiro, Director of the Ontario Institute for Studies in Education, was appointed as the sole Commissioner for the Commission on Private Schools in Ontario, advised by a committee of fifteen members appointed by the government. His commission required inquiry on four points:

a) to document and comment on the contribution of private schools in elementary and secondary education in Ontario;

b) to identify and comment upon possible alternative forms of governance of private schools ...;

c) to comment upon whether, with reasonable attendant obligations, public funding of private schools ... would be desirable and compatible with the independent nature of such schools; and

d) to identify and comment upon existing and possible relationships between private schools and publicly supported school boards.[11]

The Commissioner's report was submitted to the government on October 31, 1985 and released soon thereafter. To date, there has been relatively little public or official interest in the report, in large part due to the salience of the separate school funding issue. The report is particular interest, though, because it enunciates principles clearly and possesses a vision of a more heterogeneous educational scene with greater public involvement with private schools through funding and regulation. In considering this report, two matters will be focussed upon: the scope of private education in Ontario and the place of public funding and regulation of private schools.

The Scope of Private Schooling in Ontario[12]

In September 1984, there were 535 private elementary an secondary schools operating Ontario, enrolling 87,126 students. Overall, about 48 percent of the schools offered elementary education, 24 percent secondary education, and the balance both levels.

Enrolment in private schools grew throughout the 1970s, from 2.3 percent of all students in the province in 1973 to 4.7 percent in 1983. Growth was higher at the secondary level (a 90 percent increase) than at the elementary level (a 60 percent increase), a differene largely reflecting the accelerated growth of Catholic high schools during this period.

Eighty-eight of the 535 private schools were Roman Catholic secondary schools, all but one of which has indicated they will

become part of the separate school system as financing is extended. Excluding these, Ontario has 447 private schools enrolling 53,417 students, 69 percent in elementary and 31 percent in secondary programs. Of these 447 schools, 285 (about two-thirds) were religiously defined while the balance (i.e., 162) were non-sectarian. The largest religious sub-groupings, other than Roman Catholic, included the Alliance of Christian Schools (9,826 pupils), the Jewish schools (7,837 pupils) and the Anglican schools (5,089 pupils). Many of the non-sectarian schools reflected a particular philosophy (e.g., a Waldorf School, a Montessori school, a military academy, etc.), provided special education for children with learning disabilities, or served as preparatory schools for foreign students wishing to attend an Ontario university.

Twenty-four of Ontario's private schools enrolling 11,000 pupils are members of the Ontario Conference of Independent Schools, an association of long-established traditional schools, often residential, "representing that special image that is most commonly evoked in the public mind when the term 'private school' is used."[13]

In comparison to some many jurisdictions, the percentage of Ontario's 1,850,000 students enrolled in private schools seems quite small. It should be remembered, though, that most Catholic students in Ontario attend publicly owned and operated Roman Catholic separate schools; in countries such as the United

States, Australia and the United Kingdom, Roman Catholics who desire confessional schooling are found in the private sector.

Regulation and Funding

The Commissioner states eight principles that guide his report; three are relevant to discussions here:

> III. That ... schooling should be made available in such a way as to: ...
> c) ensure that, in a pluralistic and multicultural society, schools can contribute to the strengthening of the social fabric by providing a common acculturation experience for children.
>
> VI. That there should be no legal public monopoly in education, and private schools that meet the minimum standards specified by the government in terms of its obligation to both society and individual children should have a clear status in recognition both of the rights of citizens to make alternative choices and of the general value of diversity; and ...
>
> VIII. That, as a matter of public policy, and so long as the public policy objectives outline above are not substantially eroded, new initiatives both in the public support of private schools and in the relationship of these schools should be actively developed and tested.[14]

To act on these and other principles stated, 61 recommendations are made.

To carry out what the Commissioner saw as government's obligation to children and the maintenance of the social fabric, he recommended that all private schools be required to offer a satisfactory standard of instruction covering a basic curriculum including English or French as a first language, the arts, Canadian and world studies, language, mathematics, physical

education and science. As well, no school should be allowed to promote or foster racial or ethnic superiority, religious intolerance or other values inconsistent with a democratic society. That some private schools currently fall short of these standards is clear from the Commissioner's report on his visits to over 40 private schools.

After some 16 recommendations calling for the closer monitoring of all private schools, the Commissioner turned to the issue of funding private schools, in whole or in part. He believes, "constitutional issues aside, Ontario has no obligation to fund schools and school systems other than those currently being supported, but that, nevertheless, new initiatives in this area might be wise public policy."[15]

However, in view of constitutional issues, "the Commission believes that the argument against the status quo on the grounds that it is discriminatory against non-Roman Catholics is a very strong one. On moral grounds, limiting public support to Roman Catholic schools seems indefensible...."[16] It is even less defensible in view of the proposed extension of funding for Catholic secondary schools since "this appears to be more cleary an act of political will than a fulfillment of constitutional obligation."[17]

Given this position, the Commission felt obliged to make recommendations that would provide equity for other groups, without undo risks, as he saw them, to the ability of public

schools to offer equal educational opportunity, something that might be threatened if generous unrestricted funding of private schools were to provide an opportunity for high achieving and more affluent students to become concentrated in private schools.

Recommendations for funding were made in two groups. First, four recommendations suggest modest amounts of direct aid to all private schools (which would be required to meet the conditions previously outlined), either in the form of funding for learning materials or in kind in the form of transportation and classroom space:

> The Commission does not ... believe that such schools have a right to public funding in any way commensurate with that provided to the Province's public schools. The breadth of public purposes served, the access to and the accountability of the schools responsible to publicly elected boards of trustees are such as to (a) place them in quite a distinctive position and (b) entirely fulfill the Province's basic obligation to provide elementary and secondary schooling for its young. Nevertheless, the Commission has also acknowledged that the Province's independent schools both contribute to the richness and diversity of Ontario education and serve some important public purpose by providing schooling for a small but not insubstantial proportion of the Province's elementary and secondary school children. The programmes of limited support outlined in the recommendations ... are designed to acknowledge this contribution.[18]

However, to provide an opportunity for equitable treatment, the creation of a new type of school, one which though private would be associated with a school board, is recommended:

> That an associated school be defined in law as an independent school that has come to an agreement with a local school board to operate in association with the board and in addition to offering satisfactory instruction ...:

(i) employs only Ontario certified teachers ...;
(ii) charges no tuition;
(iii) is, within enrolment and academic constraints, open without distinction as to race, ethnic background or religion to all persons of compulsory school age who, subject to the appropriate constitutional protections, agree to participae fully in the programme of the associated school;
(iv) is a non-profit organization;
(v) is not designed primarily to offer special education programmes and services;
(vi) reports annually to the school board with which it is associated on its financial and instructional operation;
(vii) is operated by a board of governors, at least half the membership of which shall be composed of parents of students attending the school.[19]

For funding, it is recommended an annual operating grant be shared between that associated school and the school board that is linked to the annual per pupil operating costs of the local board. Further, it is recommended the two share programs in order to broaden student choice in both.

The Commission rejected the idea of recommending the "establishment and full funding of elaborate and publicly-elected trustee systems for groups of whatever size that wish to establish and independent, but publicly funded, school", an option that would parallel the operation of Roman Catholic separate schools.[20]

The creation of associated schools, the Commissioner believes, would faclitate the maintenance of schools of distinctive character without undermining the public system. To those who might see associated schools as a threat to the common school, he commented that, "in all but official rhetoric, Ontario has already parted from the common school idea in many ways (e.g., the

establishment of the separate school, the legitimization of independent schools based on the ability to pay, the frequently homogeneous grouping of children by neighbourhoods, the profound programmatic differentiation both at the secondary level and for young people with special needs, and the self-selection of students into French immersion programmes), each of which can be regarded as socially divisive."[21] In all, twelve recommendations are related to associated sch ols.

Most remaining recommendations concern items beyond the Commission's formal mandate. Eight (Recommendations 33 to 42) are concerned with adding diversity and responsiveness to public and separate schools by adding school committees, heritage languages to day school programs, and the like. Two (43 and 44) are concerned with home schooling; three (45 to 47) with religious education; seven (56 to 54) with special education; two (55 and 56) with the Ministry of Education's structure for monitoring private schools; and the remaining six with procedural matters.

The key recommendations in the Report, it seems, are those concerned with associated schools. Such an option would be similar to associate schools in Alberta, integrated schools in New Zealand, and grant aided schools in England and Wales. Though the Commission suggests creating associated schools is a "low risk" option as far as their impact on public schools are concerned, it is not altogether clear that commentators in those jurisdictions would agree.[22] Nevertheless, they clearly represent an attempt to provide greater diversity and choice within Ontario education,

and to eliminate the apparent discrimination that exists with public funding of Roman Catholic separate schools.

The Courts Speak

In the first test of the constitutionality of Bill 30 and the extension of funding to Roman Catholic separate schools, the Court of Appeal of the Supreme Court of Ontario, was asked by the Province to answer the following question:

> Is Bill 30, An Act to amend the Education Act (to provide full funding for Roman Catholic Separate high schools) inconsistent with the provisions of the Constitution of Canada including the Canadian Charter of Rights and Freedoms and, if so, in what particular or particulars and in what respect?

In a 3 to 2 decision, the Court found the proposed Act to be constitutional. Further, they found that once the school system was extended, government support for separate secondary schools would hereafter be guaranteed by the Charter.

In their judgement, the majority argued that the collective rights guaranteed by section 93 of the Constitution Act, 1867 to Roman Catholics and to Protestants could not be infringed upon by the individual rights guaranteed by section 15 of the Charter. Further, they rule that section 29 of the Charter exempts from the Charter any new legislation affecting the educational rights of these groups. Their judgement is based on the use of the word "under" in the phrase, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Consitution of Canada in respect of denominational, separate or

dessentient schools." Since legislation by provinces is made pursuant to the Constitution, it qualifies for exemption if it is concerned with Roman Catholic (or Protestant) separate schools.

Thus, if the province had the power to extend separate schools and separate schools alone before the Charter came into force, then this power could not be removed by the Charter. That is, the Charter could not force the province to extend a right or privilege to all religious groups as far as education is concerned in order to extend it to Roman Catholics.

The majority found that, in fact, the province did have the power to fund secondary education in Roman Catholic separate schools before the Charter by virtue of its power to regulate education, though they accepted by virtue of the Tiny decision that there was no right to this funding. Therefore, it may provide funding for Catholic high schools now, without providing comparable benefits to members of other religious groups.

"This conclusion," they write, "does not mean, and must not be taken to mean that separate schools are exempt from the law or the Constitution. Laws and the Constitution, particularly the Charter, are excluded from application to separate schools only to the extent they derogate from such schools as Catholic (or in Quebec, Protestant) institutions. It is this essential Catholic nature which is preserved and protected...." The judges chose not to rule on whether or not certain sections of the Bill, such as those requiring separate school boards to hire non-Catholic

teachers displaced as a result of the policy for a ten year period or requiring the admission of non-Catholic students in certain circumstances, violate constitutional rights, preferring instead to deal with these matters on a case by case basis. "In any event, the individual sections to which objection was taken are severable and do not pertain to the critical aspect of the Bill providing for full funding of separate schools."[23]

In the dissenting opinion, virtually all of the points made above are rejected. The dissenting judges "do not accept the proposition that any benefit given to separate schools in Ontario by post-Confederation legislation enacted after the Charter by the province under its s.93 power to make laws in relation to education is shielded from scrutiny under the Charter...."

> ...the Charter is part of Canada's Constitution, our supreme law; it establishes a new relationship between the individual and the state. Its text marks the metes and bounds of government authority and individual autonomy. If Bill 30 is inconsistent with the Charter, it is the duty of the courts as guardians of our Consitution, to declare the Bill of no force or effect.
>
> In our opinion, Bill 30 is inconsistent with the s.15(1) of the Charter which gives to every individual the right to equal benefit of the law without discrimination based on religion. If this right is to mean anything, it must mean at least that the followers of one religion are not to be the beneficiaries of greater benefits provided by law than the followers of other religions. Bill 30 provides benefits on the basis of religion to one religious group only and is therefore in direct conflict with this right.

The dissenters agree that Bill 30 would have been a constitutional use of provincial powers before the Charter, but hold this is no longer the case. Further, they hold that section 93 rights are

not expandable, so that even if the Bill had been legislated at that time the rights and privileges it provides would not be guaranteed in the same way the right to separate elementary schools are guaranteed. In particular, they "cannot accept that the word 'under' imports the broad and all-encompassing consequences attributed to it."

> We reject the notion that every future piece of legislation enacted by the province under s. 93 which confers rights or privileges on Roman Cathlic separate schools is placed by s. 29 beyond the purview of the Charter. In our opinion, this Charter provision cannot properly be construed so as to sweep within its ambit all those statutory enactments with respect to separate schools which may at some future time be passed by the legislature pursuant to its plenary power over education simply because the legislature is acting within its legislative competence.

Instead, section 29 of the Charter is seen to apply only to the rights and privileges that existed in 1867 and were guaranteed by the section 93 of the Constitution Act, 1867.

In stating that Bill 30 violates section 15 of the Charter, the dissenters note it must be given a "large and liberal interpretation ... particularly so in dealing with religion, so as to give full effect to s. 27 of the Charter which recognizes the multicultural mosaic of contemporary Canadian society and requires that:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Thus, they see section 15 as pertaining to both individuals and groups. They note Bill 30 is opposed by "the Ontario Alliance of

Christian Schools, by the Coaltion for Public Education Ontario Inc. which includes the Anglican Church, the Baptist Convention of Ontario and Quebec, the Presbyterian Church, and the United Church of Canada, and by the Seventh-Day Adventist Church, the Canadian Unitarian Council and representatives of the Jewish and Hindu communities." Further, no consideration appeared to have been given by the government,

> to the desirability of extending state support, or further state support, to the denominational education of any religion. While the government appointed a Commission on Private Schools in Ontario ..., the report, issued subsequent to hearing, is not part of these proceedings. As matters presently stand, no government policy has yet been formulated which takes into account the reality that denominational schools other than Roman Catholic exist in Ontario or which seeks to accommodate the Charter rights of supporters of those schools or promote the proclaimed objective of s. 27 to preserve and enhance the multicultural heritage of Canadians.[24]

Conclusion

What conclusions can be drawn about the evolution of the Ontario educational system? When the title of this paper was chosen in summer 1985, the second part was declarative not interrogative. That is, I was convinced that a new social contract was evolving, one in which cultural wealth of Canada's many different groups, religious and ethnic, would be preserved and enhanced. In view of the public and governmental response, or lack of response, to the Report of The Commission on Private Schools in Ontario and the decision of the Court of Appeal, I am not so sure.

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Government policy, supported by the court, is to provide full funding to a complete system of elementary and secondary Catholic schools, but to offer nothing new to all other groups. Why is this the case, given the apparent commitment to equal benefits from the law and to multiculturalism in the Canadian Charter of Rights and Freedoms?

My own hope is that it is primarily a matter of political strategy. That is, they believe it is smarter to move one step at a time. First, complete the Catholic system, then extend support to others. All at once would be too much for the public, especially those of British Protestant origin, to accept.

The majority on the Court of Appeals, it has been suggested by some rather cynical commentators, made its decision first, and then sought a legal rationale for this decision. This may well be the case, for as the review of the consitutional aspects of the issue in the first section of this paper suggested, there were reasonably sound arguments that could be used to defend any of at least three positions. The Court simply chose to ignore the fact that secondary schools are an institutional form that arose, historically, after the common school, both in Canada and many other countries. Since the functions of the two long overlapped due, especially, to low population densities and low participation rates in higher grades in rural areas, one can choose to emphasize either their commonalities or differences. They chose the commonalities and concluded government regulatory powers included the power to add secondary grades to separate schools.

Quite clearly, the Court wanted to guarantee government funded and operated Catholic high schools in Ontario, a policy that parallels the rights of Protestants in Quebec and of Catholics in Saskatchewan, Alberta and Newfoundland. Ontario would no longer stand out as the only province with separate or denominational school boards that allowed them to offer only elementary education.

Had the court not taken the view it did, what might have occurred? To consider this, it is useful to focus on who the intervenants were in support of and opposed to Bill 30 and the government's position.

The intervenants supporting the view the court took were, not surprisingly, primarily Roman Catholic separate school boards. It was in their interest to do so.[25]

The composition of opposing intervenants is more complex. Some, such as public boards of education and the federations with teachers in these boards, were opposed not only to extension of Catholic system but also to the possibility of government support for schools for other groups without constitutional protection. Others, however, such as the Alliance for Christian Schools and the Canadian Jewish Congress, may have had alternative motive. For them to gain the equal benefits promised by the Charter of Rights and Freedoms, it was first necessary for Bill 30 to be declared unconstitutional. Only then could a bill meeting their desires, one which would recognize the plurality of preferences

for different types of education, be developed and introduced. That is, for them broadening of the education system must be done at once, not in stages. Further, if Bill 30 were unconstitutional, then they could gain the Catholics as their allies in support of the new, broader bill. No such alliance probably would be possible if the Catholics achieved their objectives first, independent of the others. This strategy might not have appealed to Catholics since it probably appeared less likely of success than going it alone, particulary once the government had committed itself publicly to funding separate high schools.

Bill 30 still has one more hurdle, the Supreme Court of Canada, to which the Ontario decision is being appealed. If this Court sustains the decision made by the Ontario Court of Appeal, then the issue of the provision of high schools for Roman Catholic schools will be settled, though skirmishes over issues such as student access and equitable funding will no doubt occur.[26]

For other groups, however, the fight will continue. After a proper interval, Ontario may, in the name of fairness, extend some more generous form of assistance to them as well. In this, they would again be following the lead of the other provinces with complete separate school systems. But then again, they may not.

If, however, the Supreme Court overturns the decision on appeal, something that is certainly possible, a new phase will be entered, in which Roman Catholics ally with other groups in order to

achieve the objectives they hold in common. My guess is that, having gone this far, the government will then be obliged to find a solution that accepts the idea that the province is stronger for supporting its diversity, rather denying it and pursuing an educational policy that prevents its many cultural groups from teaching their children the special values and knowledge that make them unique. The Shapiro Commission report and the dissenting opinion concerning Bill 30 prove there are leaders in the province with the vision to realize the ideals of the Charter. Unfortunately, as yet this vision has not be accepted by Ontario's government nor shared among its citizens.

FOOTNOTES

1. C. B. Sissons, Church and State in Canadian Education, Toronto: The Ryerson Press, 1959; pp. 96-112.

2. "Statement to the Legislature by William G. Davis, Premier"; June 12, 1984. Appendix A in The Report of The Commission on Private Schools in Ontario, Toronto: The Commission on Private Schools in Ontario, October 1985; pp. 73-76.

3. From 1867 to 1982, the British North America Act, 1867 (BNA Act), an act of the British Parliament, served as the Canadian constitution. During this period, the final court of appeal concerning constitutional disputes was the Privy Council in England and all amendments to the act had to be approved by the British parliament. In 1982, by action of British parliament on recommendations from the Canadian parliament, the act was patriated to Canada and renamed the Constitution Act, 1867. It can now be amended only in Canada and the Supreme Court of Canada is now the final court of appeal on constitutional matters. The accompanying Constitution Act, 1982 included the Canadian Charter of Rights and Freedoms, which came into full effect in April 1985.

   The key section of the BNA Act regarding education is section 93, which granted exclusive jurisdiction in the field of education to the provinces, with the exception that "nothing in any law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by law in the Province at Union." Further, religious minorities with separate schools were granted the right of appeal to the Federal government against "any Act or decision of any Provincial Authority affecting any Right or Privilege" that they possessed in law at the Union, and the Parliament of Canada was granted the authority to make remedial laws as circumstances required. In Ontario and Quebec, Roman Catholics and Protestants (but not individual Protestant denominations or sects) are treated as a "class of persons" under Section 93.

4. C. B. Sissons, loc. cit.

5. C. B. Sissons, op.cit., p. 100; see also, Roman Catholic Separate School Trustees for Tiny vs. The King (1928) A.C. 363.

6. According to the 1981 census, of Ontario's 8,625,107 residents, 3,036,245 or 35% were Catholic, 4,418,960 or 51% were Protestant, 167,320 or 2% were Eastern Orthodox, 148,255 or 1.7% were Jewish, 618,600 or 7% expressed no religious preference, 137,110 or 1.6% were Eastern non-Christian and 7,770 had other beliefs. Classified accord-

ing to origin, 4,487,800 or 52% reported British origins, 652,900 or 8% French origins, 2,610,915 or 30% other single origins, and 782,645 or 9 percent multiple origins. 1981 Census of Canada, Catalogue 95-942.

7. See note 3 and Neil Finkelstein, "Legal and Constitutional Aspects of Public Funding for Private Schools in Ontario". Appendix D in The Report of The Commission on Private Schools in Ontario, Toronto: The Commission on Private Schools in Ontario, October 1985; pp. 81-108. The Appendix to this appendix provides a description of Section 93 clauses on a province by provice basis.

8. Canadian Charter of Rights and Freedoms, s. 15(1).

9. Canadian Charter of Rights and Freedoms, s. 29, states, "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

10. "Statement to the Legislature by William G. Davis, Premier"; June 12, 1984. Appendix A in The Report of The Commission on Private Schools in Ontario, Toronto: The Commission on Private Schools in Ontario, October 1985; pp. 73-76.

11. The Report of The Commission on Private Schools in Ontario, Toronto: The Commission on Private Schools in Ontario, October 1985; pp. 1-2.

12. Statistics in this section are taken from The Report of The Commission on Private Schools in Ontario, Toronto: The Commission on Private Schools in Ontario, October 1985; pp. 5-6.

13. Ibid., p. 6.

14. Ibid., pp. 39-40.

15. Ibid., p. 48.

16. Loc. cit.

17. Ibid., p. 49.

18. Ibid., p. 51.

19. Ibid., p. 55.

20. Loc. cit.

21. Ibid., p. 56-57.

22. See, for example, Ivan Snook, "The Integration Act and Its

Aftermath". In Colin McGeorge and Ivan Snook, Church, State and New Zealand Education, Wellington: Price Milburn, 1981; pp. 45-58.

23. Reference re Bill 30, An Act to amend the Education Act, Supreme Court of Ontario, Court of Appeal, February 19, 1986. Majority opinion.

    It might be noted the majority ignored the rights of Protestants to separate schools in Ontario and of Catholics to separate schools in Quebec. The original legislation was very much tailored to local situations rather than whole provinces. Had they taken account of this, they might have found Bill 30 faulty in view of section 15 of the Charter because the Bill does not offer full funding for separate Protestant high schools in Ontario. That is, though the Charter may not guarantee benefits to groups without Section 93 protection, ought it not at least apply to both groups that have such protection? Of course, the question is academic given the small size of the one active Protestant separate school board in Ontario.

24. Reference re Bill 30, An Act to amend the Education Act, Supreme Court of Ontario, Court of Appeal, February 19, 1986. Dissenting opinion.

25. One could argue that in accepting Bill 30 for themselves and not insisting that the government extend assistance to other religious groups, Roman Catholics in Ontario are falling short of the ideals set in Vatican II's Declaration on Christian Education, which states, "... the (Roman Catholic) Church esteems highly those civil authorities and societies which, bearing in mind the pluralism of contemporary society and respecting religious freedom, assist families so that the education of their children can be imparted in all schools according to the individual moral and religious principles of the families."

26. On the issue of student access, see Stephen B. Lawton, "A Case Study of Choice in Education: Separate Schools in Ontario". Paper presented at the Phi Delta Kappa 40th Biennial Conference; Toronto, Ontario; October 31 - November 1, 1985.